

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:NTX:DAL:TL-N-2874-00
JSRepsis

date: March 13, 2001

to: Caren Humphreys, Team Manager, LMSB Group 1307
Communications, Technology & Media

from: John Repsis, LMSB Attorney, Area 4 - Dallas

subject: Statute Extension - [REDACTED] Entities

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By memorandum dated March 5, 2001, you solicited our opinion regarding a recent request by the taxpayer's representative to extend the statute of limitations for three TEFRA partnership cases related to the [REDACTED] hedge fund. This request involves the three TEFRA partnership entities currently under examination for their [REDACTED] tax years:

[REDACTED]

The statutes of limitations for [REDACTED] for their [REDACTED] tax years will expire on [REDACTED]. The statute of limitations for [REDACTED] for its [REDACTED] tax year will expire on [REDACTED].

Specifically, a concern has been raised as to who is the proper party to execute consents for each of the above entities. Although inextricably interrelated, this memorandum will deal with each entity separately in discussing the proper party to execute a consent. We have attached Exhibit 1 from your memorandum which details the relationship between the partnerships.

ISSUES

1. Who is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year?
2. Who is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year?
3. Who is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year?

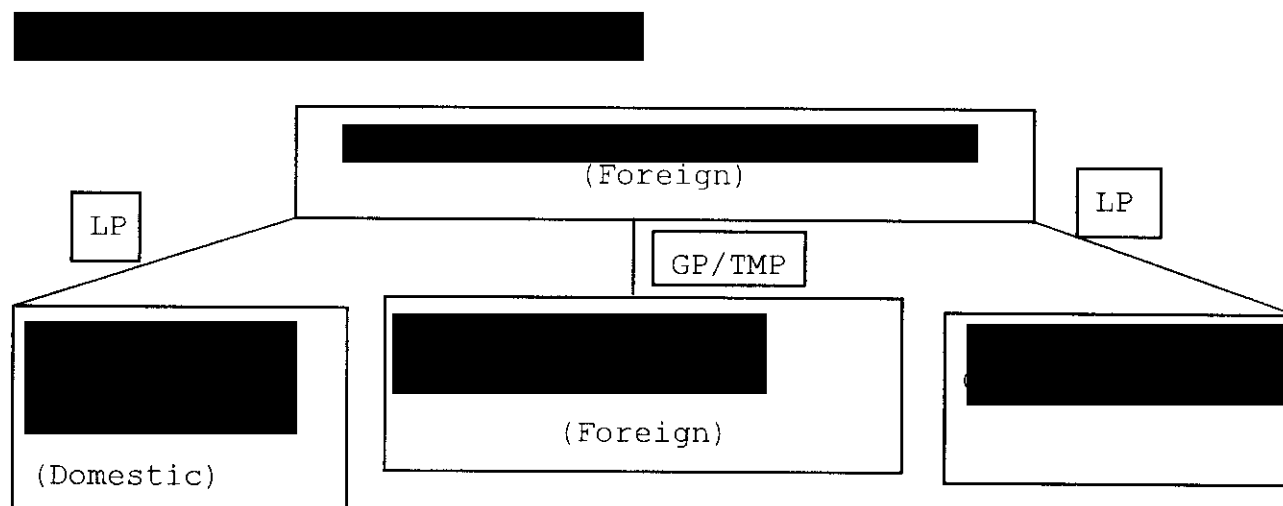
SHORT CONCLUSION

Subject to the caveats listed below, the appropriate person for the entity shown should sign the consent to extend the statute of limitations:

1. [REDACTED] is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year.
2. [REDACTED] is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year.
3. [REDACTED] is the proper party to execute a consent to extend the statute of limitations for [REDACTED] for its [REDACTED] tax year.

An example of the appropriate signature block in each instance is provided below.

DISCUSSION



[REDACTED] is a [REDACTED] exempted limited partnership that began business on [REDACTED]. Between [REDACTED] and [REDACTED] it had only one general partner who was also the tax matters partner, [REDACTED] (also a [REDACTED] exempted limited partnership which had a [REDACTED] % general partnership interest in [REDACTED]).

A different general partner, [REDACTED] was designated tax matters partner for [REDACTED], the year it entered the partnership. However, we do not have any documentation which indicates that [REDACTED] should be considered a successor to [REDACTED] for [REDACTED].

The other partners of [REDACTED] were limited partners. It is not known if these entities are still in existence.

Discussion

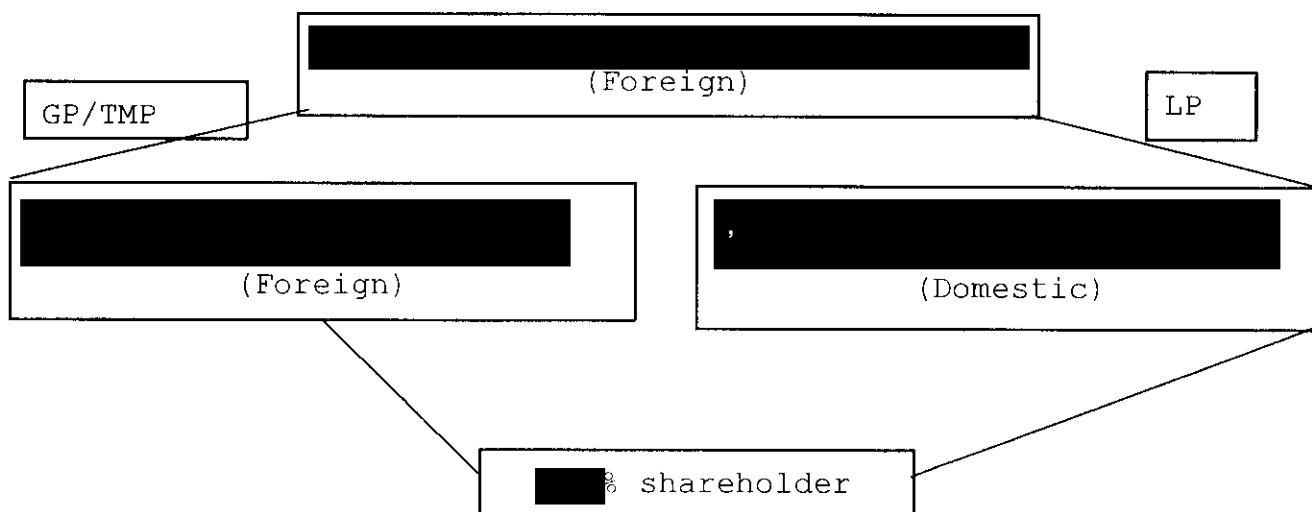
A consent to extend the statute of limitations for a partnership executed at the entity level extends the period of assessment on all investors. The tax matters partner or other person authorized in writing by all general partners may extend the limitations period for the assessment of partnership and affected items at the partnership level for all partners. Section 6229(b)(1)(B) and Treas. Reg. § 301.6229(b)-1T.

Generally, any entity may be designated as a tax matters partner for a taxable year of a partnership if that entity was a general partner during the taxable year or a general partner at the

time of designation. Treas. Reg. § 301.6231(a)(7)-1(b). Once designated a tax matters partner, that general partner remains the tax matters partner for that taxable year unless the designation is revoked, superseded or a terminating event occurs. Treas. Reg. § 301.6321(a)(7)-1 specifically deals with the designation, selection and termination of a tax matters partner.

In the case at hand, [REDACTED] was designated the tax matters partner on the [REDACTED] partnership return. Of critical importance is that [REDACTED] was the only general partner. Treas. Reg. § 301.6231(a)(7)-1(b)(2) states that a partnership may not designate a partner who is not a United States person (as defined by Section 7701(a)(30)) without the consent of the Commissioner, unless no other partner is eligible to be designated the tax matters partner. Since [REDACTED] is a foreign partnership, it is not considered a United States person under Section 7701(a)(30). However, only [REDACTED] could be designated by the partnership as the tax matters partner since it is the only general partner and only general partners may be designated by a partnership as the tax matters partner. Accordingly, [REDACTED] may sign a consent as the tax matters partner to extend the partnership statute of limitations for [REDACTED].

Unfortunately, the analysis cannot stop here. [REDACTED] is only the first tier in a string of related entities. Our analysis focuses next on subsequent levels of ownership of [REDACTED]:



[REDACTED] has [REDACTED] partners, only [REDACTED] of which is a general partner. [REDACTED] ([REDACTED]) is the sole general partner and tax matters

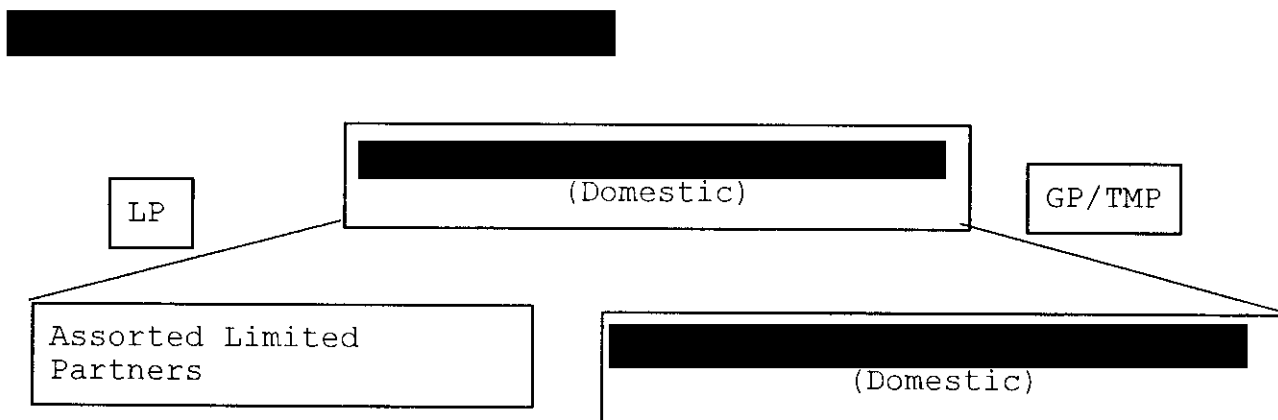
partner for [REDACTED] for [REDACTED]. [REDACTED] is a [REDACTED] exempted limited liability company having a [REDACTED] general partnership interest in [REDACTED]. [REDACTED] is the other partner holding a [REDACTED] limited partnership interest in [REDACTED]. [REDACTED] is also the [REDACTED] shareholder of [REDACTED].

As previously stated, Treas. Reg. § 301.6231(a)(7)-1(b)(2) does allow a foreign general partner to be a tax matters partner if there is no other partner that could be designated the tax matters partner. Here, the only other partner is a limited partner who cannot be designated as a tax matters partner by the partnership. As such [REDACTED] is the proper partner to be the tax matters partner for [REDACTED]. [REDACTED], in turn, is the proper party to sign as tax matters partner for [REDACTED].

The signature block for the [REDACTED] consent would be as follows:

[REDACTED] by (Name of authorized representative of [REDACTED] and title), Member-Manager and Tax Matters Partner which is the Tax Matters Partner of [REDACTED] which is the Tax Matters Partner of [REDACTED].

From Exhibit 4 attached to your Memorandum, [REDACTED] appears to be a limited liability company. Please see the discussion below for [REDACTED] as to who in a limited liability company can sign a partnership consent. You will have to determine if a member-manager has been selected or designated for [REDACTED]. If not, then all members are considered member-managers and may sign the consent.



[REDACTED] was formed as a domestic investment vehicle for United States investors in [REDACTED]. [REDACTED] is a Delaware limited partnership formed on [REDACTED]. It is possible, but not certain, that [REDACTED] may have liquidated during [REDACTED].

[REDACTED] is the sole general partner and designated tax matters partner of [REDACTED]. [REDACTED] was designated as the tax matters partner of [REDACTED] for the tax years [REDACTED] through [REDACTED].

The remaining partners of [REDACTED] are limited partners. They are composed of approximately [REDACTED] partners who are corporations, partnerships and individuals.

In [REDACTED], [REDACTED] converted from a partnership to a corporation. The conversion was accomplished under the new "check-the-box" regulations that permit taxpayers to choose how an entity will be treated for Federal tax purposes. Representations have been made that every asset and liability of the partnership were transferred to the new corporation.

A U.S. Corporation Income Tax Return (Form 1120) was filed by [REDACTED] for its tax year starting [REDACTED]. The return was signed by [REDACTED] (one of the principals of the [REDACTED] hedge fund) as follows:

Member, [REDACTED], as General Partner of [REDACTED]
[REDACTED] as General Partner of [REDACTED].

By this signature, you believe, and we concur, that [REDACTED] is still functioning as a partnership for all purposes, other than Federal tax purposes.

Discussion

As previously stated, a tax matters partner is designated on an annual basis for each tax year. Once designated, the general partner remains the tax matters partner until his designation is revoked, superseded or a terminating event occurs. It is inconsequential that the partnership may have terminated in a year subsequent to the year of examination. The tax matters partner still has authority to act for the partnership and collection is not impeded as the partners are liable for any deficiency.

[REDACTED] was designated the tax matters partners on the [REDACTED]'s [REDACTED] tax return. The designation appears valid

since it is a general partner (in fact, the sole general partner). A general partner, however, may no longer be the tax matters partner upon its liquidation or dissolution, if the tax matters partner is an entity. Treas. Reg. § 301.6231(a)(7)-1(1)(1)(iii).

In [REDACTED], [REDACTED] elected under the "check-the-box" regulations to be taxed as a corporation for Federal tax purposes. Under the regulations for this provision, if a partnership elects to be taxed as an association that is taxable as a corporation, the partnership will be deemed to have contributed all of its assets and liabilities to the association in return for stock in the association. The partnership would then be deemed to liquidate by distributing the stock in the association to its partners. Treas. Reg. § 301.7701-3(g)(1).

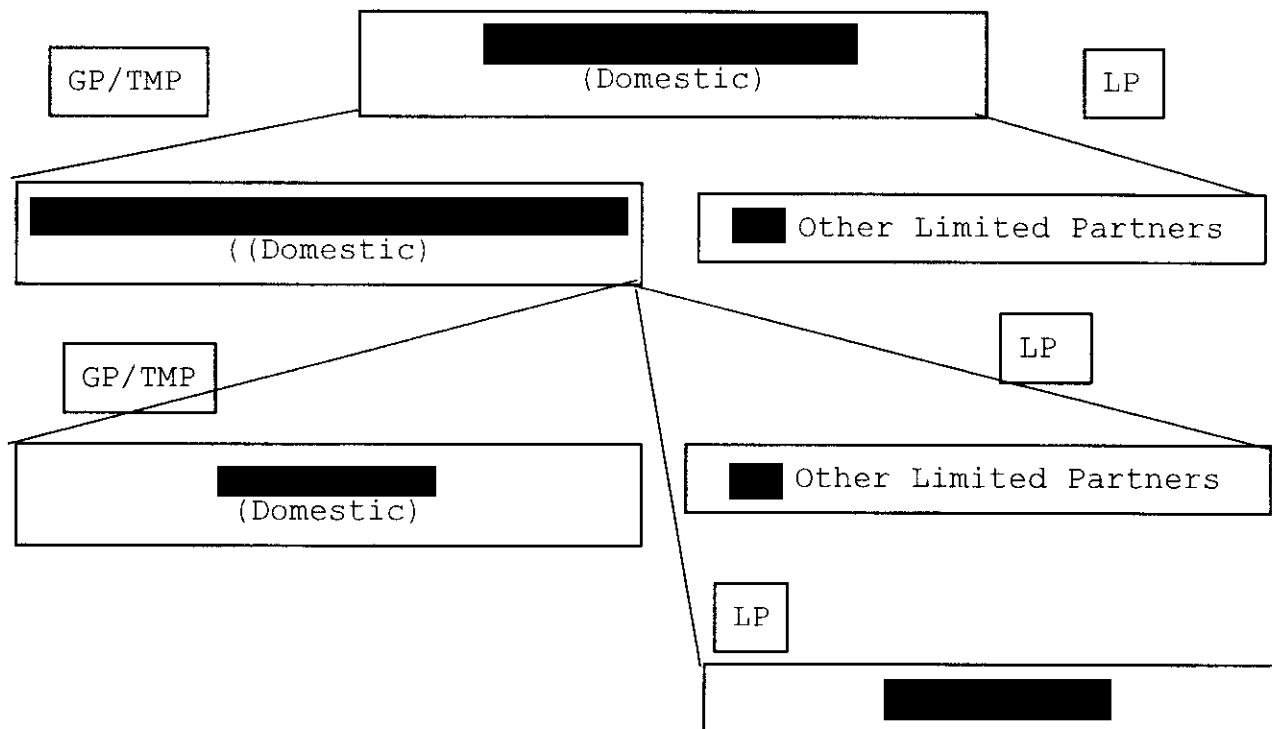
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Unfortunately, our determination that [REDACTED] is still the tax matters partners for [REDACTED] does not end our inquiry as to who may sign a consent for [REDACTED] for [REDACTED]. [REDACTED] is only the first partnership in a chain of other partnerships which control [REDACTED].



Your memorandum of March 5, 2001, does not provide details as to the entity structure below the [REDACTED] level. However, based upon your attached Exhibit 1, it appears that [REDACTED] is a limited partnership which is the sole general partner and tax matters partner for [REDACTED]. Prior to [REDACTED], [REDACTED] was formerly known as [REDACTED]. We assume that [REDACTED] was designated the tax matters partner for [REDACTED] for its [REDACTED] tax return.

In turn, [REDACTED] has as its general partner and tax matters partner, [REDACTED]. We again assume that [REDACTED] was designated the tax matters partner for [REDACTED]. In both instances, since [REDACTED] and [REDACTED] are the sole general partners, they alone may be designated the tax matters partner by their respective partnerships.

[REDACTED] represents a different set of considerations as it is a limited liability company. Treas. Reg. § 301.6231(a)(7)-2(b) defines a limited liability company as an organization formed under a law that allows the limitation of the liability of all members for the organizations's debts and other obligations within the meaning of § 301.7701-3(b)(2)(ii); and classified as a partnership for Federal tax purposes. Treas. Reg. § 301.7701-

3(b)(2)(ii) provides that limited liability exists if a member has no personal liability for the debts of or claims against the entity by reason of being a member. This determination is based solely on the statute or law pursuant to which the entity is organized, except that if the underlying statute or law allows the entity to specify in its organizational documents whether the members will have limited liability, the organizational documents may also be relevant.

Treas. Reg. § 301.6231(a)(7)-2 defines who may be a tax matters partner for a limited liability company. Only a member-manager of an LLC is treated as a general partner, and a member of an LLC who is not a member-manager is treated as a partner other than a general partner. Treas. Reg. § 301.6231(a)(7)-2(a). Accordingly, since only a general partner may be designated by a partnership as the tax matters partner under Treas. Reg. § 301.6231(a)(7)-1, only a member-manager of an LLC may be designated a tax matters partner by the partnership.

Who may be a member-manager is also defined by the regulations. A member is any person who owns an interest in an LLC. Treas. Reg. § 301.6231(a)(7)-2(b)(2). A member-manager is a member of an LLC, who, alone or together with others, is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the organized was formed. Generally, state law LLC statutes permit an LLC to elect or designate a member-manager. If there are no elected or designated member-managers, then each member will be treated as a member-manager. Treas. Reg. § 301.6231(a)(7)-2(b)(3). Treas. Reg. § 301.6231(a)(7)-2 is effective for all designations, selections and terminations of a tax matters partner of an LLC occurring on or after [REDACTED] Treas. Reg. § 301.6231(a)(7)-2(c).

In the case at hand, [REDACTED] appears to have the ultimate authority to sign a consent for [REDACTED]. The signature block for the consent would be as follows:

[REDACTED] by (Name of authorized representative and title), Member-Manager and Tax Matters Partner of [REDACTED], which is the Tax Matters Partner of [REDACTED] which is the Tax Matters Partner of [REDACTED] which is the Tax Matters Partner of [REDACTED]

You will have to determine if a member-manager has been selected or designated for [REDACTED]. If not, then all members are considered member-managers and may sign the consent.

[REDACTED]

The chain of control over [REDACTED] has previously been discussed under [REDACTED]. The various considerations regarding who may sign the consent are the same.

The signature block for [REDACTED]'s consent is correspondingly slightly shorter:

[REDACTED] by (Name of authorized representative and title),
Member-Manager and Tax Matters Partner of [REDACTED] which is
the Tax Matters Partner of [REDACTED] which is the Tax
Matters Partner of [REDACTED]

You will have to determine if a member-manager has been selected or designated for [REDACTED]. If not, then all members are considered member-managers and may sign the consent.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Undoubtedly, the securing of a consent under TEFRA can pose challenges creating uncertainties regarding the validity of the consent. This is particularly true where, as in this case, the tax matters partner is an indirect partner of a flow-through entity. If any of the factual representations expressed above are incorrect, then the advice rendered herein may not be accurate. In addition to the concerns expressed above, we note the following.

1. Existence of Entities

Based upon your understanding of the facts, it is not clear whether the [REDACTED] entities ([REDACTED] and [REDACTED]) are still in existence. If either of these entities, or any tax matters partner, has dissolved or been liquidated, it will be necessary for a new tax matters partner to be designated. Since all the effected partnerships have only one general partner, who was designated the tax matters partner, it may be necessary to name a limited partner as the tax matters partner.

A limited partner can be the designated by a partnership as a tax matters partner where no general partner currently is capable of acting as the tax matters partner. Treas. Reg. § 301.6231(a)(7)-1(f). This procedure may prove extremely cumbersome since the designation must be signed by persons who were partners at the close of the taxable year [for which the consent is

desired] and were shown on the return for that year to hold more than 50% of the aggregate interest in the partnership profits held by all partners as of the close of such taxable year. Treas. Reg. § 301.6231(a)(7)-1(f)(2)(iv). Each partnership appears to have multiple limited partners. It may be impossible for them to designate a limited partner as a tax matters partner before the statute of limitations expires.

Alternatively, should the partnership fail to designate a new tax matters partner under Treas. Reg. § 301.6231(a)(7)-1(f), the Service may designate a limited partner as a tax matters partner under Treas. Reg. § 301.6231(a)(7)-1(p). The factors to be considered for selection of a tax matters partner are listed in Treas. Reg. § 301.6231(a)(7)-1(q)(2). The Service's ability to designate is restricted since the regulations provide for a 30-day notification of the Service's selection to the partnership prior to the designation taking effect. During this notification period, it is contemplated that the partnership may make its own selection under an applicable provision of the regulation. Treas. Reg. § 301.6231(a)(7)-1(r)(2). For both [REDACTED] and [REDACTED], it does not appear that enough time exists for the 30-day notification period to be met before the statute of limitations expires.

2. [REDACTED] and "check-the-box" regulations

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3. [REDACTED], [REDACTED] and Tax Matters Partner

We have assumed that [REDACTED] and [REDACTED] meet the definition of a limited liability company under Treas. Reg. § 301.6231(a)(7)-2(b). As such, a member-manager may be designated a tax matters partner under Treas. Reg. § 301.6231(a)(7)-1. If no tax matters partner has been

designated on their tax returns, then we believe the best course of action is allow the LLC to designate a tax matters partner using the appropriate procedure under Treas. Reg. § 301.6231(a)(7)-1. It is unclear if a member-manager, who is not designated the tax matters partner, can bind all the partners in another partnership of which the LLC is a partner.

We share your concern that the correct tax matters partner execute the consents. We note that each of the partnerships for whom consents are needed have less than 100 partners. As such, each partner is a notice partner and should receive a final partnership administrative adjustment notice. Section 6231(a)(8). The FPAA will allow them to file in a court and, potentially, challenge the validity of any consent.

If you are not able to obtain the information noted above to determine who is the proper tax matters partner to sign a consent, or cannot timely obtain the information, then FPAAs should be issued to protect the government's interest.

This document is subject to the Large Case Coordination Procedures of CCDM 35(19)4(4). Pursuant to this provision, a copy of this advice has been forwarded to the Associate Chief Counsel for his review concurrent with the providing of this advice to you. Within ten days of receipt, the appropriate Associate Chief Counsel is required to respond regarding the advice. The response will indicate whether the National Office: (a) concurs with the field advice; (b) believes some modification of the advice is appropriate; or (c) needs additional information or time for analysis in order to evaluate the advice. Our office will inform you of the comments received by us.

Our office will maintain its file on this case pending notification from you that it may be closed. If you should have any questions regarding this memorandum, please contact the undersigned at (972) 308-7900.

Mark E. O'Leary
Associate Area Counsel (LMSB)

By: _____
John S. Repsis
Attorney (LMSB)

Enclosures:
Exhibit 1 from your Memorandum